IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 108

ELLIOT L. RICHARDSON, Secretary of Health, Education, and Welfare,

Petitioner,

v.

PEDRO PERALES,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether mere uncorroborated hearsay evidence (doctor's reports) as to the critical issue in a Social Security disability case (claimant's physical condition) standing alone in a hearing before a hearing examiner, can be substantial evidence that will support a decision of the hearing examiner adverse to the claimant, when the claimant objects to the hearsay evidence and the hearsay evidence is directly contradicted by the testimony of live medical witnesses present at the hearing and by the claimant, all of whom testify before the examiner.

2. Whether the present method of processing claims for disability benefits within the Social Security Administration bureaucratic structure, wherein the hearing examiner acts as both judge and counsel for the Social Security Administration and where the hearing examiner assimilates and presents the secretary's case and then purports to hear the evidence, can ever be said to provide a claimant for disability benefits a fair and impartial hearing protected by the basic elements of procedural due process.

STATEMENT

On April 20, 1966, Respondent-Claimant, Pedro Perales, filed his application for disability benefits under 42 U.S.C.A., Sections 416(i)(1)[1] and 423[2] of the Social Security Act. This application was denied by the Bureau of Disability Insurance on the grounds that "Claimant had failed to estab-

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1 ". . . . the term 'disability means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration, . . ."

2 "(c) For purposes of this section -

"(2) The term 'disability' means inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected

lish that he was suffering from a medically determinable physical or mental impairment or impairments of sufficient severity to prevent him from engaging in any substantial gainful activity" (Tr. 10) within the meaning of the Social Security Act.

A request for hearing before a hearing examiner was filed November 15, 1966, and the first of two such hearings was conducted on January 12, 1967, at San Antonio, Texas Following the conclusion of the initial hearing the hearing examiner, after reviewing the evidence, called a supplemental hearing in order to "clear up some discrepancies in the record and to take the testimony of a medical adviser and vocational expert" (4) (Tr. 10).

At both the initial and supplemental hearings the hearing examiner, who acts both as judge and as counsel for the Social Security Administration, offered (as counsel for the Secretary) and then (as the hearing examiner) admitted into evidence over objection of claimant's counsel certain documentary exhibits, and in particular, written, unsworn, medical reports of doctors who had examined Claimant but were not present at the hearing. Counsel for Claimant objected to the introduction of these reports as each was offered on the ground that, in the absence of the examining physician who submitted the written report, the admission of such report effectively denied Claimant the right to be confronted by witnesses against him and denied Claimant the right to cross-examine such witnesses. The theory and philosophy underlying Claimant's objection to the admission into evidence of these medical reports which was sustained by the trial court constitute the essence of this appeal.

At the two hearings, other than the admission into evidence of the unsworn medical reports of absent doctors:

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to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be under a disability unless he furnishes such proof of the existence thereof as may be required."

> "the only [additional] medical evidence presented . . . was the testimony of Dr. Max Morales, Jr. and Dr. Lewis A. Leavitt.[3] Dr. Morales testified . . . that plaintiff, in his present condition will not be able to continue gainful employment as a common laborer. Dr. Leavitt, who had never examined the plaintiff, after having been permitted, over objection to interpret what other doctors had said in their written reports, concluded that the plaintiff is suffering from low back syndrome of musculo-ligamentous origin, and of mild severity. Other evidence as to the present degree of plaintiff's physical disability was supplied by the plaintiff himself. No doctor who had personally examined plaintiff, and who had submitted a report adverse to his interest, was called upon to testify in person." Order Remanding Cause by District Court, February 13, 1968. (R. 38a) (Emphasis added).

Claimant objected "to any testimony that is not based on any hypothetical question or based upon examination." (Tr. 136).

Following conclusion of the above hearing, the hearing examiner on May 12, 1967, determined that the Claimant was not entitled to disability benefits.

On June 16, 1967, Claimant requested review by the Appeals Council of the decision of the hearing examiner, and on July 20, 1967, he was notified of the Appeals Council's affirmance of the hearing examiner's decision. He was advised that the Appeals Council's affirmance constituted the final decision of the Secretary in his case (Tr. 1). He was further advised that if review of the Secretary's final decision was desired, such action should be commended within 60 days of the decision of the Appeals Council.

Such an appeal was taken by Claimant to the United States District Court for the Western District of Texas seek-

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[3]Dr. Leavitt was flown to San Antonio from Houston specifically for the purpose of testifying at this hearing. (Tr. 17)

ing to reverse the decision of the Social Security Administration. The Secretary answered the Claimant's Complaint and both parties filed motions for summary judgment. On February 13, 1968, the District Court, following the hearing on said motions, denied both plaintiff's and defendant's motion for summary judgment and remanded the cause to the Secretary for a full new hearing before a different hearing examiner. In his memorandum opinion filed August 13, 1968, discussing the remand order, Judge Spears stated at 288 F.Supp. 313, 314:

> "Except in unusual circumstances, and none are shown to exist in this case, this Court is reluctant to accept as substantial evidence the opinions of medical experts submitted as original evidence in the form of unsworn written reports, the admission of which would have the effect of denying to the opposition an opportunity for cross-examination. *Ratliff v. Celebreeze*, 338 F.2d 978, 982 (6 Cir. 1964); *Mullen v. Gardner*, 256 F. Supp. 588 (E.D. N.Y. 1966).
>
> "Similarly, the opinion of a doctor who has never examined or treated a claimant, is entitled to little or no probative value, especially when it is opposed by evidence of a substantial nature, including the oral testimony of an examining physician. See *Hayes v. Gardner*, 376 F.2d 517 (4 Cir. 1967).
>
> "Certainly, therefore, in a situation where, as here, unsworn medical reports of examining physicians are received as original evidence on the critical issue of Plaintiff's physical condition, a non-examining medical expert is then allowed to 'interpret' those *ex parte* reports, and that 'interpretation' forms the basis for the decision by the hearing examiner, we have what amounts to pyramiding hearsay upon hearsay, which, under the circumstances of this case, *violates the fundamental rule of fair play* and cannot be permitted to stand." (Emphasis added).

The Secretary appealed from the District Court's order remanding this cause for a new hearing before a different hearing examiner. The Fifth Circuit Court of Appeals on motion for rehearing at 416 F.2d 1250 at 1251 held:

> "Our opinion holds, and we reaffirm that mere uncorroborated hearsay evidence as to the physical condition of a claimant, standing alone and without more, in a social security disability case tried before a hearing examiner, as in our case, is not substantial evidence that will support a decision of the examiner adverse to the claimant, if the claimant objects to the hearsay evidence and if the hearsay evidence is directly contradicted by the testimony of live medical witnesses and by the claimant who testify in person before the examiner, as was done in the case at bar."

SUMMARY OF ARGUMENT

The essence of Petitioner's argument and brief appears to be that the rule adopted by the District Court and the Court of Appeals below would result in an unnecessary drain on the productive time of practicing physicians and would threaten to disrupt the entire process of administering the disability insurance program. It is Respondent's contention that if to assure a claimant his right to a fair hearing which conforms to fundamental concepts of due process by requiring testimony subject to cross-examination on the critical issue to be decided amounts to a change or "disruption" of the entire process of administering the disability insurance program then such a "disruption" is vitally necessary. Respondent will argue that this procedure of requiring cross-examination of physicians has been used for years in insurance cases in the courts and in Federal Longshoreman & Harbor Workers Disability Hearings and has caused no such problems as are conjectured by the Government. Respondent will argue that the decision of the Fifth Circuit Court of Appeals below reiterates the philosophy that where a governmental administrative agency is empowered to adjudicate the rights and interests of citizens and the only appeal must be made under the substantial evidence rule, the long recognized safeguards of due process must be strictly adhered to. Respondent will further argue that the strict adherence

to the procedural safeguards of due process is particularly necessary in administrative hearings with respect to the right of the confrontation and cross-examination on testimony relating to the critical issue to be decided.

Respondent will further argue that mere uncorroborated hearsay evidence as to the critical issue in the hearing, the physical condition of a claimant in a Social Security disability benefits case, cannot be substantial evidence that will support a decision of the hearing examiner adverse to the Claimant when the Claimant objects to the hearsay evidence and when the hearsay evidence is directly contradicted by the testimony of live medical witnesses present at the hearing and by the claimant who testified before the hearing examiner.

Finally, Respondent will argue that the present method of processing a claim for disability benefits within the Social Security system, wherein the hearing examiner acts both as Judge and as counsel for the Social Security Administration and where the hearing examiner assimilates and presents the Secretary's case and then purports to "hear" the evidence that under this method of operation a claimant in many cases receives a "hearing" which is not protected by the basic elements of procedural due process.

ARGUMENT

I

Where a Governmental Administrative Agency Is Empowered To Adjudicate Rights and Interests of Citizens, Long Recognized Safeguards of Due Process Must Be Strictly Adhered to and This Adherence to Procedural Safeguards of Due Process Is Particularly Necessary in Administrative Hearings with Respect to the Right to Confrontation and Cross Examination on the Critical Issue Involved in the Hearing

Every year more and more of the decisions affecting rights of citizens in the United States by agencies at all levels of government, municipal, regional, state and federal, are being made by administrative agencies through the medium of a hearing before a Hearing Examiner who then makes a recommended decision or a decision which is usually approved by the agency for which he works. With little variance, the only appeal from such a hearing is to the court under the substantial evidence rule, which provides that if there is *any* evidence which will support the decision of the administrative agency, then the decision must be affirmed.

The decision in this particular case will affect not only Social Security disability hearings, but it will affect all administrative hearings not only by the Federal Government but by the state governments and various regional authorities as well as municipal governments. Therefore, this decision is not simply a decision that only bears on the procedures which will be required to guarantee due process under the constitution in all administrative hearings. As an example, recently, the National Transportation Safety Board ruled that even though the usual practice in hearings to determine whether or not an airline pilot's license would be revoked on medical grounds was to give full opportunity for confrontation and cross-examination on the crucial medical issue, they were not bound by the decision of the Fifth Circuit in the Perales case (the case being considered by the Court here), but if they desired, the matter could be sub-

mitted on medical reports even over the claimant's objection.

In Texas all of the hearings to determine welfare eligibility are modeled after the Social Security procedural process. In many states the right to operate an airline intrastate, the chartering of a bank, or a savings and loan association, the licensing of an insurance company, a bar, a liquor store and many more businesses that are regulated by the various states is determined in an administrative hearing.

It is Respondent's position here that in any administrative hearing, including a Social Security disability hearing, that on the crucial issue to be decided by the administrative agency due process demands that either side should have the right to cross-examine witnesses as to that crucial issue, and, in that event, admission of written statements or reports concerning the crucial issue which are disputed by other live witnesses, cannot be substantial evidence to support the decision of the administrator. Any such decision which is supported by hearsay reports or statements by calling them substantial evidence is a basic denial of due process.

This Court has previously written on what the constitutional requirements of due process of law are in an administrative hearing, which language applies to a Federal Hearing Examiner hearing a Social Security disability benefits claim, in *Hannah v. Larche*, 363 U.S. 420, 452, 80 S.Ct. 1502 (1960), where this Court has defined the type of administrative proceeding in which the procedures "traditionally associated" with the judicial process are required:

> ". . . when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization,

> it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the constitution required that a particular right obtained in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. . . ."

What is the nature of the alleged right involved? The Claimant, Pedro Perales, and his employer paid for the Social Security coverage under the Social Security law whether they wanted it or not. As stated in *Fleming v. Nestor*, 363 U.S. 603, 611 (1960) "the 'right' to Social Security benefits is in one sense 'earned,' for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their laters years or when disabled for protection from "the rigors of the poorhouse as well as the haunting fear that such a lot awaits them when journeys' end near."

As stated in *Sayers v. Gardner*, 380 F.2d 940, 942 (6th Circuit, 1967), the Court stated:

> ". . . the act was adopted pursuant to a public policy unknown to the common law, designed for the protection of society, and enacted to alleviate the burdens which rest on large number of the population because of the insecurities of modern life, particularly those accompanying old age, unemployment, and disability, through the establishment in advance of a provident fund for the needy worker, out of which he will be paid disability benefits, annuities, and compensation; and there is no question that the Social Security Act is constitutional."
>
> "The Social Security Act brought with it, among other provisions, the *right* to disability benefits for workers who have become disabled from doing the work—usually the hard manual work—that they have done during their lives."

"In Ratliff v. Celebrezze, D.C., 214 F.Supp. 209, 216, in considering a claim for disability benefits, the Court said that, as adjured by the Supreme Court, 'courts must now assume more responsibility for the reasonableness and fairness of the decisions of Federal agencies' than some courts have shown in the past and 'reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function.' Universal Camera Corp. v. National Labor Relations Board, 1951, 340 U.S. 474, 490, 71 S.Ct. 456, 466, 95 L.Ed. 456."

"In these cases, where there have been such a great number of reversals, and where the same errors have been repeatedly pointed out, the record should be carefully examined and reviewed by the courts, and an opinion should generally be written, setting forth the facts and law, to show that the courts have, in reality, assumed more responsibility for the reasonableness and fairness of the decisions of the federal agencies, than some courts have shown in the past; and that reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function, as we have been directed and cautioned by the Supreme Court in Universal Camera Corp. v. National Labor Relations Board, supra, for this case obviously means that courts should scrutinize the decisions of agencies, more than they have in the past, to ascertain whether they are reasonable and fair. The great number of errors and reversals, in the past, in these cases, constitute a fair warning signal." (emphasis added)

The right to disability benefits for workers who have become disabled from doing work, as referred to in the Sayers opinion, supra, above has been discussed as recently as March, 1970, by this court in a footnote in *Goldberg v. Kelly*, ___U.S.___, 90 S.Ct. 1011, 25 L.Ed.2d 287, wherein the Court stated at p. 1017:

"It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form

> of rights which do not fall within the traditional common-law concepts of property. It has been aptly noted that 'society is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock option; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines, channels for television stations; long term contracts for defense, space and education; *social security for individuals.* Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipient they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." (emphasis added)

In the body of the *Goldberg v. Kelly* opinion, supra, at p. 1017, Justice Brennan outlined the area wherein constitutional restraints apply:

> "*Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation.* Sherbert v. Verner, 274 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); or to denial of a tax exemption, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); or to discharge from public employment, Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956). *The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,'* Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 747, 95 L.Ed. 817 (1951) (Frankfurter, Jr., concurring), *and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental*

> *interest in summary adjudication.* Accordingly, as we said in Cafeteria & Restaurant Workers Union, etc. v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748-1749, 6 L.Ed.2d 1230 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the *precise nature of the governmental function involved as of the private interest that has been affected by governmental action.*' See also Hannah v. Larche, 363 U.S. 420, 440, 442, 80 S.Ct. 1502, 1513, 1514, 4 L.Ed.2d 1307 (1960)." (emphasis added)

Thus there can be no question that "constitutional elements of procedural due process" must be afforded the recipient of Social Security disability benefits at the hearing of his claim. The question presents itself as to what procedural due process requires as to the Social Security hearing relating to the entitlement of a claimant to benefits under the Social Security disability benefits plan. In *Goldberg v. Kelly*, supra, the Court stated at p. 1020:

> "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, *and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.* These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases."

As noted above the principles of fundamental due process of law require an adequate notice of the hearing and "an effective opportunity to defend by confronting any adverse

witnesses and by presenting his own arguments and evidence orally." The Court in *Goldberg*, supra, in speaking to the issue of confrontation and cross-examination stated that with regard to the welfare recipients before the court, the recipients were not permitted to confront or cross-examine adverse witnesses in the lower proceedings and state at Page 1021: "these omissions are fatal to the constitutional adequacy of the procedures." Continuing, Justice Brennan stated: "particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for a decision." And specifically referring to the question of whether or not due process requires an opportunity to confront and cross-examine adverse witnesses, at Page 1021 the Court in *Goldberg*, supra, stated:

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.G., ICC v. Louisville & N.R.R. Co., 227 U.S. 88, 93-94, 33 S.Ct. 185, 187-188, 57 L.Ed. 431 (1913); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-104, 83 S.Ct. 1175, 1180-1181, 10 L.Ed.2d 224 (1963). What we said in Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here:
>
> 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that *where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.* While this is important in the case of documentary evidence, *it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurors or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.* We have formalized these

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Similarly once the claimant has established a prima facie case for disability benefits by presenting live, direct, and competent medical testimony contradicting the government's hearsay medical reports, the burden must shift to the government to show that the claimant is not so disabiled. The provisions of the Social Security statutes allowing for the subpoena of witnesses must be designed to allow both parties, the claimant and the Hearing Examiner–Social Security counsel to subpoena necessary witnesses. However, the Petitioner and the Court of Appeals seem to argue that the claimant not only has the burden of proving his own case (in this case by calling the treating doctor to show that claimant was in fact disabled), but must in addition discredit the government's case by subpoenaing the medical witnesses relied on by the government in order to show that they could not and would not defeat the claimant's own live direct medical testimony.

The Social Security Act cannot be said to require claimant's fundamental due process right of confrontation and cross-examination to rest upon whether or not the claimant fails to prove the negative of that which he is claiming. It cannot be said that because a claimant does not call or does not request subpoenas for witnesses necessary to disprove his own case that because of this "failure" he should be penalized by having the government's uncorroborated hearsay become at once creditable and sufficient to sustain a denial of his claim. See *Mullins v. Cohen*, 408 F.2d 39 (6th Cir. 1969); *Gardner v. Bryan*, 369 F.2d 443, (10th Cir. 1966).

In *Southern Stevedoring Company v. Voris*, 190 F.2d 275 at 277 very similar issues were presented to the Fifth Circuit Court of Appeals. There the Fifth Circuit Court of Appeals stated:

> "The two ex parte letter reports above referred to were not under oath. The authors thereof did not take the stand, nor were appellants accorded an opportunity to cross examine them, although both of them resided in Houston, where the hearings were held,

and apparently were conveniently available. These circumstances were vigorously urged as objections were overruled . . . ."

"We are aware that sec. 23(a) of the Act, 33 U.S.C.A. 923(a), provides that in conducting a hearing the deputy commissioner 'shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. * * *' This relaxation of the ordinary rules of procedure and evidence does not invalidate the proceedings, provided the substantial rights of the parties are preserved. Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 59 St. Ct. 206, 83 L.Ed. 127, headnote 14. But this general provision does not, indeed it could not, dispense with a right so fundamental in Anglo-Saxon law as the right of cross examination. *Although administrative agencies may be relieved from observance of strict common law rules of evidence, their hearings must still be conducted consistently with fundamental principles which inhere in due process of law.* Reilly v. Pinkus, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63; McCarthy Stevedoring Corp. v. Norton, D.C., 40 F.Supp. 957; L. B. Wilson, Inc. v. Federal Communications Comm., 83 U.S. App. D.C. 176, 170 F.2d 793; Kwasizur v. Cardillo, 3 Cir., 175 F.2d 235. See also Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598."

"By admitting these ex parte statements, upon which the deputy commissoner apparently based his decision, at least in part, the *right of cross-examination was effectively denied appellants upon a crucial issue. Even under the liberal provisions of the Longshoremen's Act, we cannot sanction this practice.* As was said in Interstate Commerce Commission v. Louiseville & N.R.R. Co., 227 U.S. 88, 33 S.Ct. 185, 187, 57 L.Ed. 43, '*but the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evi-*

*dence by which rights are asserted or defended. * * * All parties * * * must be given opportunity to cross-examine witnesses * * *.' Moreover, sec. 7 (c) of the Administrative Procedure Act, 5 U.S.C.A., Section 1006(c), expressly provides that 'Every party shall have the right * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts.'"* (Emphasis added)

II

Mere Uncorroborated Hearsay Evidence as to the Physical Condition of a Claimant in a Social Security Disability Case Tried Before a Hearing Examiner Is Not Substantial Evidence that Will Support a Decision of the Examiner Adverse to the Claimant, if the Claimant Objects to the Hearsay Evidence and if the Hearsay Evidence Is Directly Contradicted by the Testimony of Live Medical Witnesses and by the Claimant Who Testify in Person Before the Examiner

The Fifth Circuit Court of Appeals below was faced with the continuing problem of determining what exactly is meant by the term "substantial evidence". This Court in *Consolidated Company v. N.L.R.B.*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938) construed substantial evidence to be more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In *Consolidated Edison Company*, supra, this Court held that mere uncorroborated hearsay or rumor does not constitute substantial evidence.

In *Willapoint Oysters, Inc. v. Ewing*, 9 Cir. 1949, 174 F.2d 676, 690, cert. denied, 338 U.S. 860, 70 S.Ct. 101, 94 L.Ed. 527, the Court said:

> ". . . substantial evidence includes more than 'uncorroborated hearsay'."

See also *Hill v. Fleming*, 169 F.Supp. 240 (W.D. Pa., 1958); *United States v. Arumsiek*, 111 F.2d 74, 78; Vol. 32A C.J.S. Evidence, Section 1016 (1964); *Frank Camaro*

v. United States, 345 F.2d 798 (1965); and *N.L.R.B. v. Amalgamated Meat Cutters*, 9 Cir., 1953, 202 F.2d 671, 673, wherein the Court stated that:

> ". . . agency findings cannot be based upon hearsay alone."

The Court of Appeals in its original opinion stated at Page 53 of 412 F.2d:

> "The testimony of the 'expert' Dr. Leavitt, cannot serve to corroborate the hearsay reports of the absent doctors. His testimony was correctly described by the trial court as 'hearsay on hearsay.' Multiple hearsay is no more competent than single hearsay. United States v. Grayson, 2 Cir., 1948, 166 F.2d 863, 869; United States v. Bartholomew, 137 F. Supp. 700, 709 (W.D. Ark. 1956).
>
> Accordingly, we hold that mere uncorroborated hearsay or rumor does not constitute substantial evidence."

Respondent is not contending that hearsay evidence is not admissible, but rather Respondent's contention is that even though admissible, where such hearsay is objected to and contradicted by direct, competent testimony then hearsay remains uncorroborated and cannot be substantial evidence. Petitioner's brief argues that the hearsay evidence in question in the case now before this Court is better than the usual hearsay because it has "inherent reliability" in that Petitioner says the medical reports now in question are written by independent physicians who have no motive to be anything but impartial. Petitioner overlooks the fact that many of the reports in this case were written by doctors employed by the Workmen's Compensation Insurance Company trying to defeat Respondent's claim for Workmen's Compensation. In addition, all members of this Court recognize that doctors do differ and in this particular type of hearing there would not be a hearing unless there was a difference of opinion between the doctors. Any practicing trial lawyer can tell you that many times when a doctor says in his report and what finally is said after a searching

and thorough cross-examination are two completely different things. Many times reports are written in haste and many times in reports doctors will write that since no objective findings were made he cannot report disability even though the same doctor will admit on cross-examination that many patients with only subjective findings are treated by him for years and have been disabled for great lengths of time.

It is significant that in Appendix C in the Government's brief that in cases involving the revocation of a pilot license where a man's job that will pay from $40,000.00 to $60,000.00 a year is involved that the FAA makes it practice to call physicians for live testimony on that issue and does not take the position that the government takes in its brief that the reports have "inherent reliability." Also in the Longshoremen and Harbor Workers Compensation Acts the Department of Labor's Hearing Examiners require live testimony. Why should medical reports not be so "inherently reliable" as to allow presentation in those cases and yet be so "inherently reliable" in Social Security disability cases that they can be introduced. The only possible argument that could be made by the government is that when there are a great number of cases administrative expediency demands that due process be abandoned. However, it is obvious that the government has given the Court no figures as to the actual amount of contested cases that are tried before Hearing Examiners where the claimant has a physician who opposes the position taken by the physicians relied upon by the government. It is significant that as reported to a seminar of the American Bar Association that in 1968 there were only approximately 1,000 cases appealed to the District Courts in the United States, which would indicate that these are the cases wherein there was a serious disagreement between the physicians.

Another factor indicating that these reports are not as "inherently reliable" as the government claims is that in the case at bar in the Workmen's Compensation proceeding for Mr. Perales where the doctors whose reports were relied on

by the Hearing Examiner had to actually appear and testify, that Mr. Perales was granted total and permanent disability.

The practice of using so-called "medical advisers" who do not examine the claimant seems even more reprehensible. The Social Security Administration tells us on one hand that they cannot find the funds to bring the doctors who have examined the man to testify and yet on the other hand can pay travel fees to fly these so-called "medical advisers" around the state and yet do not feel they should even have the claimant examined by the "medical advisers". It would seem far better if the Social Security Administration would spend this money on the doctors who have examined the claimant to come and testify rather than having doctors who have never examined the claimant come and give medical advice to a Hearing Examiner strictly on the basis of reports. The only basis to justify the medical examiner system who has never examined the claimant is to assume that the doctors who have examined the claimant and who are relied upon by the Government are not competent to give advice to the Hearing Examiner. Even the Government cannot make this contention. In addition to the condemnation made by the Fifth Circuit in this case the Sixth Circuit has also condemned this practice in the case of *Mefford v. Gardner*, 383 F.2d 748 (1967) wherein it was held that where another "circuit riding" doctor had never examined and never seen the claimant at any time and still concluded that claimant had no impairment:

> "Such a statement cannot be considered substantial evidence in view of the fact that he never saw or examined the appellee, and in face of the medical evidence of physicians who not only treated him over a long period of time but also examined him and came to the determination that he was totally and permanently disabled."

The holding of the Court of Appeals below is only that uncorroborated hearsay is not substantial evidence and limits its circumstances as follows:

1. Where the claimant has presented a prima facie case for disability benefits by offering direct, adequate and competent evidence testimony which contradicts the uncorroborated hearsay written reports.

2. The claimant has objected to the uncorroborated hearsay at the time it is offered.

3. The evidence adverse to the claimant's direct and competent testimony is "solely" uncorroborated hearsay.

There is no blanket rejection of all uncorroborated hearsay. The holding of the Court of Appeals below applies only under the circumstances as outlined above. If circumstances should arise as outlined above and there has been no direct, competent evidence to counter claimant's direct, competent evidence other than the uncorroborated hearsay written report, the government has the full right and perhaps the duty under the statutes to subpoena the reporting physician and to further develop the government's case. If by following this course of action the Secretary is inconvenienced, such inconvenience must be required. To allow the continuing practice of denying claims for disability benefits based solely on uncorroborated hearsay seriously does away with the traditional concepts of confrontation and cross-examination in procedural due process.

III

The Present Method of Processing Claims for Disability Benefits Within the Social Security System Wherein the Hearing Examiner Acts Both as Judge and as Counsel for the Social Security Administration and Where the Hearing Examiner Assimilates and Presents the Secretary's Case and Then Purports to "Hear the Evidence" Denies a Claimant a Fair Hearing Protected by the Basic Elements of Procedural Due Process

In commenting upon the importance of cross-examination Professor Wigmore has stated:

> "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. Belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength and lengthening experience." 5 Wigmore on Evidence (3rd Edition 1940), Section 1367.

In affirming the District Court decision the Court of Appeals below stated that the "Administrative Procedure Act" does not control the method of conducting hearings under the Social Security Act, if in conflict therewith, and the right of cross-examination provided for in the former will not prevail over the procedures established by the Secretary under the latter statute." App. 42 Subsection 7(D) of the Administrative Procedure Act, now 5 U.S.C.A. Secs. 556 and 557 provides in part:

> ". . . any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repitious evidence . . . . a party is entitled to conduct . . . such cross-examination as may be

required for a full and true disclosure of the facts . . ." (5 U.S.C.A. Sec. 556(d)).

The problem is the Secretary of Health, Education and Welfare has taken the position that in regard to Medical Reports in a disability claim, cross-examination is not required for a full and true disclosure of the facts.

Respondent takes no position as to whether the Administrative Procedure Act must apply to Social Security cases. Respondent simply says that regardless of whether the statute provides it or not, procedural due process requires the right of cross-examination on the crucial issue to be heard.

Much time and space has been spent above considering the nature of due process in administrative hearings, what the provision for due process in administrative hearings such as the Social Security disability benefits must include (confrontation and cross-examination), and the extent and nature of the evidence which must be present to constitute "substantial evidence" sufficient to deny a claim under the Social Security disability benefits law. What has not been considered and what should also be considered by this Court is the broader question of whether under the Social Security Act and under the Code of Federal Regulations which set forth the procedure presently followed under the Act a claimant receives a hearing which has the "basic fairness" required by due process. As the Court so eloquently stated in *Southern Stevedoring Company v. Voris*, supra, at Page 277:

> ". . . although administrative agencies may be relieved from observance of strict common law rules of evidence, their hearings must still be conducted consistently with fundamental principles which adhere in due process of law . . ."

Justice Brennan in *Goldberg v. Kelly*, supra, stated that in this regard:

> ". . . of course, an impartial decision maker is essential. Cf. In re. Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); Wong Yang Sung v.

> McGrath, 339 U.S. 33, 45-46, 70 S.Ct. 445, 451-452, 94 L.Ed. 616 (1950) . . . . He should not, however have participated in making the determination under review."

The Presiding Officer, Hearing Examiner, in a Social Security disability hearing has at once the responsibility of gathering the evidence, deciding which evidence to present, and seeking to make the Government's case as strong as possible. When the Government in its brief seeks to set out that a Social Security disability hearing is not an "adversary" proceeding they are simply not being realistic about what is actually going on. We certainly would not think it basic fair play and it would be a violation of due process if in a criminal case the District Attorney after presenting the evidence he had obtained against the accused, thereupon became the trier of the facts and listened to any evidence the accused had and judged his own evidence and the accused's evidence and rendered a decision. In the procedure under the Longshoreman and Harbor Workers Compensation Act it is recognized that the Department of Labor's Hearing Examiner is solely a judge and does not have to present the evidence for either side. While it is theoretically possible, it would be the rare Hearing Examiner who after gathering all of the Government's evidence and then presenting it, would sustain objections to the evidence that he has gathered and presented and who would not tend to lean, even though he might try not to, toward a decision in favor of the evidence that he had gathered. Furthermore, even if he could by some stretch of the imagination be completely impartial, it gives the appearance of evil even where no evil is present and in these days of questioning of our whole judicial system the appearance of evil is as much to be avoided as the actual evil itself. This philosophy is behind the recently adopted rules for the Federal Judiciary. In this regard to the avoidance of the appearance of evil this Court stated in *In re. Murchison*, 349 U.S. 143, 75 S.Ct. 623, 99 L.Ed 942 (1955) as follows:

"A fair trial and a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual vice in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man and a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar a trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. *But to perform its high function in the best way 'justice must satisfy the appearance of justice'* Offutt v. United States, 348 U.S. 11, 14, 17 S. Ct. 11, 13."

". . . the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than any other witness. There were no public witnesses upon whom petitioners could call to give disinterested testimony concerning what took place in the secret chambers of the judge . . . . in either even the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such a way." (emphasis added)

In our United States the growth of a complicated administrative process has reached far greater proportions than could have been envisioned a few years ago. Individuals subject to the jurisdiction of the particular administrative

agency in this United States are subject to an awe inspiring deluge of paper. Endless forms must be filed with endless governmental agencies in order to obtain basic rights in our democracy. In the case of the Social Security disability benefits claim numerous documents have to be filed prior to the time a hearing is even had. As is indicated by Petitioner's brief and as is indicated in Respondent's brief above, the process which must be traveled before a hearing is had is a very complicated one at best. When the "Judge" during the hearing on the disability claim states to a claimant that "now that you have heard the government's evidence as to your non-disability which I have just presented you may proceed to put on your evidence of disability", what else can a claimant feel other than that the cards are "stacked against him".

This present procedure now used in Social Security cases should be modified to have an independent hearing examiner such as in the Longshoremen and Harbor Worker's Act in order to provide the fair hearing which due process demands.

CONCLUSION

Respondent says that the decision of the Fifth Circuit should be affirmed not only on the grounds set forth in the opinion of the Court of Civil Appeals for the Fifth Circuit, but on the additional ground that it is a denial of due process of law under the Constitution of the United States to refuse to allow cross-examination of witnesses as to the crucial issue before the Hearing Examiner in an administrative hearing where binding decisions are made which directly affect the substantial rights of individuals and this includes a Social Security disability hearing.

Respondent also says that in addition to the foregoing, due process also requires that the present system for hear-

ing disability cases where the Hearing Examiner acts as counsel for the Social Security Administration and as a judge should be eliminated.

Respectfully submitted,

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